SC84679

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. JEREMIAH W. (JAY) NIXON,
AND
CARROLL COUNTY TRUST COMPANY,

Relators,

v.

THE HONORABLE JOHN R. HUTCHERSON,
Retired, Circuit Judge, 8th Judicial Circuit, Ray County,

Respondent.

Relator Attorney General's Reply Brief in Support of Petition for Writ of Prohibition

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Class Plaintiffs have no special interest in the charitable trust.

(Responds to Respondent's Points I and IV.)

Respondent asserts that the class plaintiffs have a special interest in the Axtell Trust because they have been denied the benefits of scholarships and farm life (Resp. Br. 15). Therefore, under the very limited exception to the traditional rule, the class plaintiffs have standing to assert their claims (Resp. Br. 14).

The traditional rule provides that only the Attorney General has standing to enforce charitable trusts. *Dickey v. Volker*, 11 S.W.2d 278, 282 (Mo. 1928). Where the trust is meant to benefit the public generally and no certain persons are entitled to it, a suit regarding administration of the trust must be brought by the Attorney General. *Id*. at 281-282. "The Attorney General is a proper party and perhaps the only proper party to bring such an action." *Murphey v. Dalton,* 314 S.W.2d 726 ,730 (Mo. 1958).

The exception Respondents rely on is very narrow. In very limited circumstances, when beneficiaries have such a special interest in the trust, they may bring suit to enforce it. *Dickey*, 11 S.W.2d at 281. Thus, for example, "if there is a gift or dedication for a church or meeting-house, to be owned by the church, parish society or by pew-holders who have [a] vested right and can sue, the Attorney General cannot sue in his official capacity, unless the gift is so public and indefinite that no individuals or corporations have the right to come into court for redress." *Id*.

But here there is no such group. Ms. Axtell made the dedications generally to citizens of two Missouri counties who may or may not be eligible to receive benefits under the trust. This is not the definition of a special interest.

Moreover, a special interest allowing the beneficiary to bring suit must be so different from what the Attorney General represents that there would be a conflict of interest for the Attorney General to represent the public and the special interest. *Dickey,* 11 S.W.2d at 281. In this case there is no such conflict of interest. Furthermore, the plaintiffs did not even attempt to plead a special, conflicting interest.

Importantly, the charitable interests in the Axtell Trust are not ripe. However, once they become ripe, the public interest, protected by the Attorney General, is to enforce the terms of the charitable trust - an interest identical to that of the class plaintiffs. Respondent asserts that the class has been denied access to scholarships (Resp. Br. 15). Under a reasonable reading of the Will, however, scholarships are only available following the death of the last life beneficiary. Lucille Palmer is still living. Therefore, the claims are not ripe.

Additionally, Respondent argues that the class has been denied exposure to farm life (Resp. Br. 15). No evidence has been introduced that there are sufficient funds available to develop the stock ranch. Therefore, the claim for loss of benefit from the stock ranch is not ripe.

There are no ripe claims for the plaintiffs to bring. Once the claims ripen, they are identical to those of the Attorney General. Therefore, there is no special interest to give the class plaintiffs standing and the Attorney General is the proper party to assert claims against the trust.

Appeal is not an adequate remedy.

(Responds to Respondent's Points II and III)

Respondent claims that appeal is an adequate remedy for Relators (Resp. Br. 16).

However, Respondent ignores *State ex rel. State of Missouri, Dep't. of Agric. v. McHenry*, 687 S.W.2d 178, 181 (Mo. 1985). Waiting until the end of litigation to appeal class certification would leave the Relator open to a case with "burdensome discovery," as well as a trial. *Id*. The Relator should not have to burden himself with an appeal at the end of a trial simply because the trial court acted beyond its jurisdiction. Thus, a later appeal is not an adequate remedy for Relator.

Additionally, Respondent argues that prohibition is not proper because the Judge has already signed the Order certifying the class (Resp. Br. 17). Prohibition is a remedy to prevent inferior court from acting outside its jurisdiction. *Birdsong et al. v. Adolf*, 724 S.W.2d 731, 732 (Mo. App. E.D. 1987). In this case the majority of the court's action with regard to the matter remains to be performed. No trial has occurred. Therefore, allowing the court to proceed and hear this case as a class action would be allowing the court to act outside its jurisdiction, and the writ is appropriate.

CONCLUSION

Based on the foregoing, the preliminary writ should be made permanent.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains _____ words, excluding cover, this certification, signature block and appendix, as determined by WordPerfect 9 software;

2. That the attached brief includes all the information required by Supreme Court Rule 55.03;

3. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

4. That two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of December, 2002, to:

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